APPENDIX A

In the United States District Court
For the Western District of Wisconsin

Bernard J. Collins and Marian Collins,
Plaintiffs,

v.

The Ridge Tool Company, a foreign corporation,
Defendant.

69-C-216

OPINION AND ORDER

Following the return of a special verdict by a jury herein, and the entry of judgment pursuant to the verdict, defendant has moved for judgment notwithstanding the verdict and, in the alternative, for a new trial.

Motion for Judgment Notwithstanding the Verdict

This motion is made on the grounds: (1) that there is no credible evidence that the defendant was negligent, that the product was unreasonably dangerous to the user, that the operator was not provided instruction by the defendant and was not fully knowledgeable as to the proper operation procedures and positions, and that the hazard associated with the rotating pipe was not open and obvious and known to the plaintiff so as to render the absence of a specific warning meaningless: and (2) that as a matter of law the causal negligence of the plaintiff was greater than the causal negligence of the defendant.

For the purpose of this motion, I must determine whether the evidence, along with all of the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the plaintiff, is such that reasonable persons in a fair and impartial exercise of their judgment might reach different answers to questions 1 and 2 of the special verdict, and different answers to whether the causal negligence of the plaintiff was greater than the causal negligence of the defendant (question 5). Here the evidence was clearly not sufficient to require reasonable persons to answer those questions only in the manner urged by the defendant.

Motion for a New Trial

Defendant's alternative motion is made on six grounds, three of which are that the verdict is against the weight of the evidence, that the amount of the damages is excessive, and that the interests of justice require a new trial. Unless and except as a new trial may be required on any of the other three grounds, discussed below, I am aware of no interest of justice which requires a new trial. The injuries sustained by the plaintiff Bernard Collins were severe; the resulting injury to the plaintiff Marian Collins was genuine; the sum awarded for loss of earning capacity was not unreasonable in view of the nature and extent of the plaintiff's injury and in view of his age, and in the verdict in this respect the jury demonstrated that it could not accept the glib estimate embodied in the bland, condescending, and simplistic testimony of plaintiff's expert; the amounts entered by the jury in answer to questions 6(a) and 6(b) were not unreasonably high. In determining whether the jury's answers to any of the questions in the special verdict were against the weight of the evidence, I am not simply to substitute my responses for those of the jury; in the exercise of my discretion, I cannot say that my responses differed from the jury's in such degree that I can hold its answers to be against the weight of the evidence.

I will take up in sequence the remaining three grounds of the motion for new trial.

Defendant contends that it was error to receive certain evidence, over its objection. The disputed evidence related to: a "bossed" switch on a Ridgid 700; a foot switch improvised by the witness Nachreiner; and certain opinion testimony. There was no unfairness in permitting testimony concerning the Ridgid 700 simply as an illustration of the use of a boss to guard a switch button, and the testimony and demonstrations concerning the footswitch, all the subject of lively cross-examination, also fairly raised the question of a workable alternative to defendant's design as to switch location. The opinion testimony of the witnesses Nachreiner, Bollinger, and Skogen was well within permissible limits; Nachreiner's practical experience was considerable; the limits on Bollinger's and Skogen's competence, and the infirmities in the bases for some of their opinions were adequately explored; the jury's award for reduced earning capacity is reasonable enough to indicate that defendant was not prejudiced by the testimony of George Delehanty.

I do not understand the basis of defendant's motion with respect to the testimony of the witness Weibel concerning the refusal to receive opinion evidence of the witness Weibel regarding the "normal" operating positions of an operator during the cutting operation. For a witness to testify how the machine has been normally used by those who have been operating in the trade it would be necessary to establish the necessary foundation in terms of opportunity widely to observe such operations.

I consider that the grounds for the defendant's motion which relate to instructions are serious grounds deserving of careful scrutiny and consideration. I accorded these contentions such scrutiny and consideration during the discussions with counsel while the instructions were being formulated. I have carefully reviewed these questions in considering the post-trial motions. I am not persuaded that the instructions were erroneous or prejudicial to the defendant, and I believe the trial record adequately reveals the bases of my views.

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Order

Upon the basis of the entire record herein, it is ordered that defendant's motion for judgment notwithstanding the verdict and defendant's motion for a new trial are hereby denied.

Entered this 26th day of January, 1973.

By the Court

/s/ JAMES E. DOYLE
District Judge

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APPENDIX B

520 F.2nd 591 (1975)

***Note: Reported opinion makes no reference to Petition for Rehearing In Banc or Decision Thereon.

In the
United States Court of Appeals
For the Seventh Circuit

No. 73-1337

Bernard J. Collins and Marian Collins,

Plaintiffs-Appellees,

vs.

The Ridge Tool Company,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 69-C-216
James E. Doyle, *Judge*

Argued February 19, 1974—Decided August 13, 1975

Before Pell, *Circuit Judge;* Campbell, *Senior District Judge;** and Grant, *Senior District Judge.***

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

** Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

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Grant, *Senior District Judge*. Appellees Bernard J. Collins and Marian Collins brought the present action against appellant, The Ridge Tool Company, for injuries sustained by Bernard Collins while he was using a Rigid 300 Power-Drive designed, manufactured, and sold by appellant. The Rigid 300 is a portable machine used by plumbers for cutting, reaming, and threading pipe. When the machine is used to cut pipe in accordance with the instructions set forth in the Operator's Manual, the pipe is inserted into the unit, the speed chuck (a securing clamp) and centering devices are tightened, and the cutter is applied to the pipe and its blade tightened until it contacts the pipe. Then the power is turned on, and the cutter blade is tightened until the cut is completed. Appellee, a master plumber, had used the Rigid 300 and machines similar thereto on many occasions prior to the accident. Nevertheless, on 28 November 1967, while appellee was using the machine to cut a 12-inch section of pipe, the front of his jacket became entangled in the rotating pipe. The machine toppled over, and appellee sustained severe injuries to his left arm. Subsequently, the arm had to be amputated immediately above the elbow.

In the district court, the jury found both appellant and appellee causally negligent; attributed 65% of the negligence to appellant and 35% to appellee; and assessed total damages in the amount of $247,737.75. After the damages were reduced to reflect the contributory negligence of appellee, judgment was entered against appellant in the amount of $161,029.54 together with costs and interest. Thereafter, an order denying appellant's Motion for Judgment Notwithstanding the Verdict or for a New Trial was entered. Appellant thereupon instituted the present appeal from the judgment and order in the court below.

In support of its position on appeal, appellant Ridge Tool argues initially that it breached no duty to appellee as a matter of law. In this regard, appellant claims that it cannot be held liable where the danger associated with the Rigid 300 was open

and obvious and since the possibility of injury from contact with a moving part of the machine was readily apparent to appellee, a man who had owned and operated the machine "hundreds of times". Further, the fact that the dangers inherent in the Rigid 300 were open and obvious, argues appellant, rendered unnecessary the giving of any warning to the user. Finally, with respect to the issue of appellant's duty to appellee, it is argued that the alleged lack of written instructions as to how to operate the Rigid 300 cannot support a finding of liability, given appellee's past experience in using the Rigid 300 as well as his knowledge of its operating characteristics.

Appellant also charges that the district court erred in admitting expert testimony that the Rigid 300 was unreasonably dangerous; in admitting testimony with respect to the design features of the Rigid 700 and a foot switch device; and in its instructions to the jury.

Finally, appellant asserts that there is no credible evidence which supports the jury's apportionment of negligence. In this regard, it is argued that appellee's negligence was clearly equal to or greater than any negligence of appellant; therefore, the jury's verdict, including the individual damage awards, is so excessive as to be unconscionable. Accordingly, appellant urges this Court, for the above-stated reasons, to set aside the verdict and judgment in the court below or, in the alternative, order a new trial.

In response, appellees Bernard and Marian Collins claim that the Rigid 300 was unreasonably dangerous by reason of its design, because the power switch was located in a place where it was inaccessible to anyone operating the machine from the front or left front. Additionally, they contend that under Wisconsin products liability law, the defense of "open and obvious danger" is not available to appellant as a complete bar to recovery. Rather, appellees argue that the conduct on the part of a user of an unreasonably dangerous product is subject to a compara-

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tive negligence standard. It is asserted that the doctrine of comparative fault takes into account defenses which would otherwise be absolute and treats them for the purpose of comparison under the name of negligence. In any event, appellees maintain that even if the "open and obvious danger" defense does apply, the inaccessibility of the power switch on the Rigid 300 was a dangerous condition that was not open and obvious to appellee. Rather, it was a condition, says appellee, which most users would not discover, and a danger which most users would not appreciate until they were already entangled in the rotating pipe. Further, because of the inaccessibility of the switch, appellees contend that the potential operator should have been warned to stand near the switch while running the machine. At the very least, appellees argue that appellant had an obligation to provide full and adequate instructions to potential users of the Rigid 300 regarding its safe operation.

In further response to appellant's position in this appeal, appellees contend that the trial court did not err in admitting expert testimony that the Rigid 300 was unreasonably dangerous; in admitting testimony relating to the Rigid 700 and the foot pedal device; and in its instructions to the jury.

Finally, appellees emphasize that the jury's allocation of causal comparative negligence is supported by the evidence. In this respect, it is urged that the damage awards were neither excessive nor in disregard of applicable law, but rather accurately reflected and compensated appellees for the loss which they sustained. Accordingly, appellees ask this Court to affirm the verdict and judgment entered in the court below.

It is axiomatic in products liability law, and appellant concedes, that a manufacturer is legally bound to design and build products which are reasonably fit and safe for the purpose for which they are intended. Nevertheless, it is equally clear that a manufacturer is under no duty to produce accident or foolproof products. *Zahora v. Harnischfeger Corporation*, 404

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F.2d 172, 175 (7th Cir. 1968). Neither is the manufacturer an insurer that its product is incapable of producing injury. *Garrison v. Rohm and Haas Company*, 492 F.2d 346, 351 (6th Cir. 1974). In determining the reasonableness of design, certain factors which should be examined include: 1) conformity of defendant's design to the practices of other manufacturers in its industry at the time of manufacture; 2) the open and obvious nature of the alleged danger; and 3) the extent of the claimant's use of the very product alleged to have caused the injury and the period of time involved in such use by the claimant and others prior to the injury without any harmful incident. *Ward v. Hobart Manufacturing Company*, 450 F.2d 1176, 1182 (5th Cir. 1971). Other relevant factors, which are practical or economic in nature, include: 4) the ability of the manufacturer to eliminate danger without impairing the product's usefulness or making it unduly expensive; and 5) the relative likelihood of injury resulting from the product's present design. *Magnuson v. Rupp Manufacturing, Inc.*, 171 N.W.2d 201, 208 (1969). As to the latter two factors, although we realize, upon our careful review of the record, that there was ample testimony in the court below by appellee's experts that the switch on the Rigid 300 could have been relocated, or that a different switching system could have been incorporated into its design,there was also testimony elicited which indicated that there were no other machines similar to the Rigid 300 utilizing emergency control systems and that the incorporation of such a cut-off device would be costly as well as affect the utility of the product. While we believe that this testimony as to the feasibility or non-feasibility of installing alternative switching systems or relocating the switch on the Rigid 300 is indeed relevant to, and will not be overlooked in arriving at our decision in the present appeal, we are inclined to attach more significance to, and thus we now focus our attention upon, the issue which we believe, because of the particular circumstances involved herein, will ultimately determine the outcome of the instant appeal; and that issue involves the alleged duty on the part of appellant herein to appellee in light of the

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argument that the danger to appellee, a master plumber with many years experience, was open and obvious.

Appellant would have us follow what is generally known as the "open and obvious" rule enunciated in *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802, 804 (1950), and the equivalent of which this Court applied in *Posey v. Clark Equipment Company*, 409 F.2d 560 (7th Cir. 1969). The "open and obvious" rule, simply stated, holds that a manufacturer of a product is under no duty to guard against or give notice of dangers which are obvious or patent to the user. *Campo, supra*, 95 N.E.2d at 804. In effect, *Campo* stands for the broad proposition that liability will not be imposed on the manufacturer unless there is a "latent defect", irrespective of whether or not the injury was incurred by accidental or voluntary contact. *Dyson v. General Motors Corporation*, 298 F.Supp. 1064, 1072 (E.D.Pa. 1969). Although this doctrine has received wide support and has been applied in many jurisdictions,[1] including this Circuit,[2] there is an indication that the more recent trend of the cases evidences an increasing dissatisfaction with the *Campo* doctrine and opts instead in favor of an approach which reflects an effort to "discourage misdesign rather than encouraging it in its obvious form", *Palmer v. Massey-Ferguson, Inc.*, 3 Wash.App. 508, 476 P.2d 713, 719 (1970), and which further recognizes that "manufacturers ought to make safer not more dangerous products." *Dorsey v. Yoder Company*, 331 F.Supp. 753, 759 (E.D.Pa.

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[1] *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343 (Mo., 1964); *Parker v. Heasler Plumbing & Heating Co.*, 388 P.2d 516 (Wyo., 1964); *Bradshaw v. Blystone Equip. Co. of Nevada*, 79 Nev. 441, 386 P.2d 396 (1963); *Tyson v. Long Mfg. Co.*, 249 N.C. 557, 107 S.E.2d 170 (1959); *Standard Conveyor Co. v. Scott*, 221 F.2d 460 (8th Cir. 1955); *Jamieson v. Woodward & Lothrop*, 101 U.S.App. D.C. 32, 247 F.2d 23 (1957); *Brown v. General Motors Corp.*, 355 F.2d 814 (8th Cir. 1966); *Bowman v. Kaufman*, 387 F.2d 582 (2nd Cir. 1967).

[2] *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966); *Neusus v. Sponholtz*, 369 F.2d 259 (7th Cir. 1966).

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1971). These and other authorities take the view, in general, that no distinction should be made between products whose dangers are obvious or latent to the user, in order to discourage misdesign even in its obvious form. Other commentators have said that the *Campo* doctrine should apply only when plaintiff appreciates the danger inherent in the product. 1 Frumer & Friedman, *Products Liability* § 702, p. 117 (1974).

Although we take notice of the fact that this Court has in the past aligned itself with the so-called *Campo* rule, *Posey, supra*, 409 F.2d at 563-564 and *Downey v. Moore's Time-Saving Equipment, Inc.*, 432 F.2d 1088, 1092 (7th Cir. 1970), we would be remiss if we failed to note that both of those cases were based upon and involved the application of Indiana law. In the present appeal, nevertheless, it is undisputed that Wisconsin law governs the issues at bar. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Accordingly, we are constrained to determine the issues herein presented as we believe the Wisconsin courts would under the circumstances.

The leading Wisconsin case in the area of products liability appears to be *Dippel v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55 (1967), interpreting the earlier holding of *McConville v. State Farm Mutual Automobile Ins. Co.*, 15 Wis.2d 374, 113 N.W.2d 14 (1962). In *McConville*, the Wisconsin Supreme Court stated that the defense of assumption of risk should be treated as contributory negligence. *Dippel*, in turn, explained that the reason for this was to subject the conduct of the user of an unreasonably dangerous product to a comparative negligence standard. Appellee argues, then, that his duty "to use ordinary care to protect himself from known or readily apparent danger", *Dippel, supra*, 155 N.W.2d at 63, defines his duty with respect to open and obvious hazards, and that any negligence on his part should be, and properly was in the trial court, treated as an item of contributory negligence for purposes of comparison with the causal negligence or fault of the appellant under Wis. Stats. §

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895.045 (1969). On the other hand, appellant urges us to follow *Yaun v. Allis-Chalmers Mfg. Co.*, 253 Wis. 558, 34 N.W.2d 853 (1948), as standing for an adoption by the Wisconsin Supreme Court of the open and obvious rule concerning products liability.

While we have no quarrel with appellee's interpretation of the law of Wisconsin as it applies to this case, and while we must not in applying that law to the case at bar subscribe to the *Campo* doctrine in its pure sense, we are of the opinion that the question of whether a danger is open and obvious to a user of a particular instrumentality is not a matter which should be determined in a vacuum. Rather, the unique facts of each case should bear on the question, and thus, in our opinion, includes the status, intelligence, and more importantly, the training of the particular user involved. In this regard, we believe that the facts of the instant case require us to consider additional factors, some of which have been noted above, in determining whether, under the circumstances of the instant case, the dangers associated with the Rigid 300 were indeed open and obvious to the appellee, Bernard Collins. The first of these factors which we consider to be particularly applicable to the facts of this case is "the extent of [appellee's] use of the [Rigid 300, the product] alleged to have caused [his] injury and the period of time involved in such use by [appellee] . . . prior to the injury without any harmful incident." *Ward, supra,* 450 F.2d at 1182. Second, we are persuaded that a manufacturer's duty to impart information as to the safe use of its product, whether it be by warnings or instructions, is significantly minimized where the user is a member of a particular trade or profession with regard to a danger that is generally known to that trade or profession. *Littlehale v. E. I. duPont de Nemours & Co.*, 380 F.2d 274 (2nd Cir. 1967); *Lockett v. General Electric Company*, 376 F.Supp. 1201, 1209 (E.D.Pa. 1974). Certainly the intended user's training and experience must be considered where the issue of a manufacturer's duty to guard against

and apprise of danger is concerned. *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841, 858 (5th Cir. 1967).

With regard to the first factor, it is undisputed that appellee herein had, at the time of the accident, "owned five Rigid 300's", and prior thereto had accomplished a pipe operation with the Rigid 300 "hundreds of times". Appellee further testified that he appreciated and was fully aware of the danger of being entangled in the pipe while it was turning in the machine. As to the second factor, it is uncontested that appellee was a master plumber for several years prior to the date of the accident. Therefore, he had many years of training and experience in using and operating the machinery indigenous to his business, and had attained enough expertise, in fact, to have risen to the status of a master plumber. We are convinced, then, that appellee was a professional in his trade who, because of past experience, had to be fully cognizant of the hazards involved in his work. Accordingly, it is our opinion that although there were no emergency switches or warnings directly on the Rigid 300 itself, and even though there were no warnings or instructions in the Operator's Manual which was furnished with the unit telling the operator where to stand while cutting pipe (except for a photograph which depicts an operator in the process of cutting pipe), we have no alternative but to conclude, on the basis of our review of the record herein, that there is no evidentiary basis, given appellee's knowledge and background, for finding that appellee's injuries resulted from the negligence of the manufacturer. In this regard, we hold that appellee's injury did not result from any inherent defect in the Rigid 300 either in design or faulty construction. Rather, it is inescapable that the unfortunate injury to appellee, which we indeed acknowledge as grave, in our opinion resulted solely from a careless mistake in operation. We have no doubt, therefore, that appellee failed to use ordinary care to protect himself from a danger which he, of all people, should have readily appreciated. *Dippel, supra*, 155 N.W.2d at 63. Accordingly, since we find that the

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Rigid 300 was reasonably safe for its intended use, taking into account the training and experience of the persons for whose use the machine was intended, and that appellee's negligence was the sole cause of the injuries sustained, we find error in the verdict in the court below. We conclude, therefore, because of our holding that the sole cause of the accident was the negligence of appellee Bernard Collins, that it is unnecessary to address the other issues which the appellee has raised before this Court.

Accordingly, the judgment of the district court is Reversed and the cause is Remanded for the entry of judgment in favor of appellant, The Ridge Tool Company.

CAMPBELL, dissenting. I would have affirmed the judgment of the district court "from the bench" following oral argument, in view of the clear absence of any issue of law upon which reversal might conceivably be premised.

The product in question is a portable machine used by plumbers for cutting, reaming and threading pipe. Its motor is encased in a housing which is mounted on a tripod. The power switch is located in a recessed area on the underside of the housing. If the operator is standing on this side of the machine, the switch is easily within his reach; however, if he is operating the machine from the front or opposite side, the switch is not readily accessible. When Collins' jacket became entangled in the rotating pipe, he was unable to reach the power switch. By the time one of his employees turned the power off, Collins' left arm had been broken, dislocated and mangled, requiring amputation above the elbow.

The Rigid 300 is not equipped with any kind of emergency power cut-off device. Neither the machine nor the operator's

manual furnished by the manufacturer contains any warnings alerting the potential user to operate the machine from the power switch side or cautioning against the danger that loose clothing might become entangled.

It was plaintiff's contention that such warnings should have been given and that the Rigid 300's design rendered defendant's product unreasonably dangerous. The design defects alleged by the plaintiff related to the location of the power switch and the absence of any emergency cut-off device. Plaintiff introduced a considerable amount of expert testimony to support these contentions, including evidence regarding the feasibility of relocating the power switch on the machine so that it would be accessible from all operating positions, and evidence that it would have been feasible and relatively inexpensive to equip the machine with an emergency cut-off device ("kill-switch"), located either on the top of the machine or in the form of a foot switch. Without extensively reviewing the evidence introduced by plaintiff, suffice it to say that a considerable amount of evidence, in the form of expert testimony and otherwise, was introduced in support of plaintiff's claim that the Rigid 300's design rendered it unreasonably dangerous, and that the danger of injury was enhanced by the manufacturer's failure to post warnings on the machine or in the operator's manual.

The jury was properly charged with the task of determining whether the design of defendant's product rendered it unreasonably dangerous, and if so, whether this dangerous condition was the principal cause of Collins' injuries. The jury concluded that plaintiff's injuries were caused by the dangerous condition of the product and by the negligence of the plaintiff, apportioning 65% of the responsibility to the defendant and 35% to plaintiff, in accordance with Wisconsin law.

The conclusion reached by the majority is not based upon a finding that the trial court improperly instructed the jury or that plaintiff's theory of liability was legally insufficient. Nor

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is it grounded upon a finding that evidence was improperly admitted, or that some other trial error was committed. It is based solely on the majority's *factual determination* that defendant's product "was reasonably safe for its intended use . . . and that appellee's negligence was the sole cause of the injuries sustained . . .".

After reviewing a cold record, the majority thus substitutes their evaluation of the evidence for that of a jury which saw the witnesses and heard their testimony at trial. In my opinion, the result reached by the majority improperly and inexcusably invades the province of the jury. I would affirm.

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 22, 1975

By the Court:

Bernard J. Collins and Marian Collins, Plaintiffs-Appellees, No. 73-1337. vs. The Ridge Tool Company, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin. (69 C 216)

In light of the fact that the mandate in this cause was inadvertently issued on September 12, 1975 during the pendency of this Court's consideration of appellees' petition for rehearing en banc,

It Is Ordered that the mandate in this case be, and the same is hereby, Recalled.

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 14, 1975

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. William J. Campbell, Senior District Judge*
Hon. Robert A. Grant, Senior District Judge*

Bernard J. Collins and Marian Collins, Plaintiffs-Appellees, No. 73-1337. vs. The Ridge Tool Company, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin. No. 69-C-216. James E. Doyle, *Judge*

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, a majority of the panel having voted to deny the petition for

* Senior District Judge William J. Campbell of the Northern District of Illinois and Senior District Judge Robert A. Grant of the Northern District of Indiana are sitting by designation.

rehearing,[1] and a majority of the active members of the court having voted to deny a rehearing *en banc*,[2]

It Is Ordered that the petition for rehearing and suggestion that it be reheard *en banc* be, and the same is hereby, Denied.

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[1] Judge Campbell voted to grant the petition for rehearing.

[2] Chief Judge Fairchild and Judge Stevens voted to grant a rehearing *en banc*.

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APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 30, 1971

Before
Hon. John S. Hastings, Senior Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. William J. Campbell, Senior District Judge[1]

John McPhee, Jr., and Sheri McPhee, Plaintiffs-Appellees, vs. The Corinth Machinery Company, a/k/a Corinth American Machinery Company, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin.
No. 18,568	

ORDER

This is a diversity action for personal injury. Plaintiff John McPhee, Jr., was injured while working as a sawyer. Plaintiff Sheri McPhee is his wife. Defendant Corinth Machinery Company had supplied McPhee's employer with components of a saw mill. A unit of the machinery, called the carriage, which runs on a track, unexpectedly moved forward and pushed McPhee into the saw. McPhee had been at his station, from which movement of the carriage is controlled, but, leaving the control lever in neutral, had stepped onto the track ahead of

[1] The Honorable William J. Campbell, Senior District Judge, Northern District of Illinois, is sitting by designation.

the carriage to dislodge a splinter from near the saw. Both McPhee's legs were cut off.

By special verdict the jury found defendant causally negligent in respect to (a) failing to provide a locking device (to hold the control lever in neutral) and (b) failing properly to inspect and supervise the installation. The court had answered questions of the special verdict so as to find as a matter of law that John McPhee was causally negligent in respect to proceeding into the carriage area in the manner that he did. The jury found that John McPhee was not negligent in respect to activating the control lever after proceeding into the carriage area and attributed 80% of the total causal negligence to defendant and 20% to John McPhee. Judgment was entered in favor of plaintiffs for 80% of the damages found. The court denied defendant's motions after verdict, and motions on which ruling had been reserved, except with respect to $111,000 awarded by the jury for impairment of earning capacity, which the court determined was greater than the evidence would support. The court found that $53,800 would reasonably compensate John McPhee for impairment of earning capacity and ordered a new trial on that issue unless John McPhee should accept an amended judgment based on the reduced amount. He so elected. Defendant appealed from judgment in favor of Sheri McPhee for $120,000 and amended judgment in favor of John McPhee for $354,349.46, plus, in each case, interest and costs.

We have considered defendant's arguments that the verdict cannot be sustained as a matter of law. We are satisfied that the evidence created jury issues as to the particulars in which defendant was found causally negligent and plaintiff was found not causally negligent. There was evidence from which the jury could find that defendant should reasonably have foreseen need for a locking device. Although the contract between defendant and McPhee's employer did not expressly obligate defendant to inspect and supervise the installation of the com-

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ponents it supplied, there was evidence that in fact defendant sent its salesman out after the installation "to inspect to make sure that the equipment had been installed properly" and with authority to comment about any modification which had been made in the course of installation which would affect the operation of the unit. Liability may be predicated upon negligence in performing services so volunteered. *American Mutual Liability Ins. Co. v. St. Paul Fire & Marine Ins.* (1970), 48 Wis2d 305, 179 NW2d 864; *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.* (7th Cir., 1912), 201 F. 617; *Wulf v. Rebbun* (1964), 25 Wis2d 499, 131 NW2d 303. See Restatement of Torts 2d, Sec. 324A, p. 142.

We are also satisfied, as was the trial court, that it cannot be said as a matter of law that McPhee's causal negligence was equal to or greater than defendant's. In the light of the serious injuries sustained by Mr. McPhee, the permanent impairment of the capacity to enjoy life, as well as economic loss, physical and emotional consequences shown, and the impact of all this upon Mrs. McPhee, we conclude that none of the damage awards (after reduction of one of them by the district court) is excessive.

We have also considered the defendant's several claims of error upon the trial. We find no prejudicial error.

Accordingly, upon our review of the record, the briefs submitted, and the oral argument,

It Is Ordered that the clerk of this court enter judgment affirming the judgment and amended judgment appealed from.

APPENDIX F

In the United States District Court
For the Western District of Wisconsin

John McPhee, Jr., and Sheri McPhee,
Plaintiffs,

v.

The Corinth Machinery Company, a/k/a Corinth American Machinery Company,
Defendant.

68-C-71.

OPINION AND ORDER

This diversity action for damages for personal injuries was tried to a jury which returned a special verdict. The jury found that the defendant had been negligent in failing to provide a locking device on a sawmill machine and in failing properly to inspect and supervise the installation of the machine; and that this negligence in both respects had been a cause of the injuries of the plaintiff John McPhee. The court found as a matter of law that the plaintiff John McPhee had been negligent in proceeding into the carriage area of the sawmill in the manner he had just prior to the accident, also found as a matter of law that his negligence had been a cause of his injuries, and entered answers to this effect upon the special verdict form. The jury found that the plaintiff John McPhee had not been negligent in another respect, namely, in activating the carriage control lever after he had proceeded into the carriage area. The jury apportioned 80% of the total causal negligence to the defendant and 20% to the plaintiff John McPhee.

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The court found that $17,136.83 was the sum which would reasonably compensate the plaintiff John McPhee for his medical and hospital expenses, and the court entered this sum on the special verdict form. The jury found that $11,000 would reasonably compensate the plaintiff John McPhee for his loss of past wages, $111,000 for impairment of his earning capacity, and $361,000 for his pain, suffering and disability in the past and in the future. The jury found that $150,000 would reasonably compensate the plaintiff Sheri McPhee for the loss of the society and companionship of her husband John.

At the close of the plaintiffs' case, the defendant moved for a directed verdict, and renewed this motion at the conclusion of all the evidence. The court reserved rulings on both motions.

Judgment has been entered awarding $400,109.46 (80% of his gross damages) to plaintiff John McPhee, and $120,000 (80% of her gross damages) to plaintiff Sheri McPhee.

Defendant has moved for judgment notwithstanding the verdict (which motion is available to it, by reason of its motion for a directed verdict at the close of all the evidence) and, in the alternative, has moved for a new trial.

Motion for Judgment Notwithstanding the Verdict

The grounds for this motion are: (1) that there was no evidence of negligence on the part of the defendant; (2) that there was no evidence that the product of the defendant was in a defective condition when it left its possession or control, or that it was unreasonably dangerous to the user thereof when used as it was intended to be used; and (3) that as a matter of law the evidence showed that at least 50% of the total causal negligence was attributable to the plaintiff.

The plaintiffs clearly chose to proceed at the trial on a common law negligence theory, to the extent this theory is to be

distinguished from the so-called "strict liability" theory, *Dippel v. Sciano*, 37 Wis.2d 443 (1967). Therefore, I consider ground (2) of defendant's motion only as it bears on the negligence of defendant, referred to in ground (1).

I test defendant's motion by inquiring whether, viewing the record most favorably to the plaintiff, there is credible evidence: from which negligence on the part of the defendant could reasonably be inferred; and from which it could reasonably be inferred that less than 50% of the total causal negligence was attributable to the plaintiff. I conclude that there is credible evidence to support both inferences.

There is credible evidence from which the jury might reasonably have inferred the following facts, among others: While operating the machine, the plaintiff ("the plaintiff" will mean plaintiff John McPhee hereinafter, unless otherwise stated) brought the log carriage to a stationary position on the tracks by placing the hand lever in a neutral position; that he then proceeded down into the carriage track area to a point between the stationary carriage and the revolving saw blade; that without any force being applied to the hand lever by plaintiff or by any other person, the carriage began to move toward him, struck him, and forced him into the saw blade. In similar situations other sawyers in the industry entered comparable areas in which the unexpected movement of the log carriage would create a danger to persons in its path on its tracks. A manufacturer of such equipment might reasonably have been expected to be aware of this practice. Certain component parts of the sawmill equipment sold by defendant to plaintiff's employer were not designed so as to render the equipment safe for its intended use, particularly with respect to the danger that the carriage, while stationary, might begin to move without human intervention. Defendant accepted and actually undertook to discharge certain responsibilities in inspecting and supervising the installation of the machine in the plant of plaintiff's employer, and in so

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doing it failed to perform its duty to exercise reasonable care to give adequate warning of dangers attendant upon the proper use of the machine or warning of the facts which made such dangers likely. The danger that the carriage might move, although the hand lever had been placed in a neutral position, was not open and obvious to an operator.

Since the court had found the plaintiff casually negligent, as a matter of law in proceeding into the carriage area in the manner that he did, it became the duty of the jury to compare his causal negligence with the causal negligence of the defendant. It is a rare occasion on which the court is permitted to set aside the comparison determined by the jury. This should be particularly rare in situations in which the kinds of causal negligence to be compared are so dissimilar. For example, to compare the failure of lookout on the part of one automobile driver with the failure of lookout on the part of another may sometimes be an exercise simple enough to permit the court to conclude that the jury has performed it wholly erroneously. But it is difficult to draw a similar conclusion when the jury is called upon to compare the causal negligence of the defendant in design and in inspecting and supervising the installation of the machine with the causal negligence of the plaintiff in entering the carriage area in the manner he chose. I cannot conclude, as a matter of law, that the latter equalled or exceeded the former.

Motion for a New Trial

In the alternative, defendant has moved for a new trial on 14 grounds. The comments I have made with respect to defendant's motion for judgment notwithstanding the verdict are generally applicable to grounds numbered 1 through 5, and 13. It is necessary only to add a conclusion, which I now do, that not only was there credible evidence from which the jury's answers to the special verdict could reasonably be inferred, but that this evidence was substantial; I exclude for the present the answers to the damage questions, which I will discuss below.

The record of the trial adequately discloses the court's reasons for the rulings now challenged by the defendant in grounds numbered 7, 8, 10, 11, and 12 which relate to the empaneling of the jury, evidentiary rulings, a refusal to give certain requested instructions, a motion for mistrial because of allegedly improper behavior by the attorney for the plaintiff, and the form of the special verdict.

Ground 9 is a contention that the court erred in giving certain instructions, over objection. The principal contention here appears to relate to an instruction that it was the duty of the defendant to determine that the equipment it sold was designed "so as to render it safe for its intended use." Form instruction 1370 promulgated by the Board of Circuit Judges of the State of Wisconsin includes this language: "[I]t is the duty of a manufacturer to exercise ordinary care in the design, construction, and manufacture of its product so as to render such product safe for its intended use." The instruction given with respect to the defendant manufacturer's duty to warn is a virtually verbatim repetition of Wisconsin form instruction 1371. Defendant also objects to an instruction which the court gave explaining the operation of the Wisconsin Workmen's Compensation Act. The trial record will disclose that the matter of workmen's compensation wove its way into the trial, in significant part on the defendant's initiative, to such an extent that the wisest and most practical course ultimately appeared to be to make its operation accurately known to the jury.

Ground 14 is that "the interests of justice" require a new trial. Except for the matter next to be discussed in ground 6, I believe that the interests of justice do not so require.

Ground 6 includes a contention that the verdict of the jury as to damages is excessive and perverse, that the percentage of causal negligence attributed to plaintiff is contrary to the law and the evidence, and that the jury's verdict in these two respects

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appears to have been given under the influence of passion, bias and prejudice. I have already concluded that there was substantial credible evidence to support the jury's comparison of the causal negligence of the plaintiff and the defendant.

I turn now to the jury's answers to the damage questions.

I conclude that none of the answers to the damage questions was perverse, and that none appears to have been given under the influence of passion, bias, and prejudice. Except for the jury's answer with respect to the impairment of the earning capacity of plaintiff John McPhee, I conclude that none of the damages awarded by the jury to either plaintiff was excessive. There was substantial credible evidence to support the award for loss of past wages. It would be difficult to overvalue the damages suffered by the plaintiff John McPhee in the past, and certain to be suffered in the future, with respect to pain and suffering; impairment of health, physical ability, and bodily functions; disfigurement; humiliation, embarrassment and worry; and deprivation of usual activities, benefits and enjoyments. The same can be said of the damages suffered by Sheri McPhee by deprivation of her husband's aid, assistance, comfort, and society, past and future.

I conclude that the award of $111,000 to plaintiff John McPhee for impairment of his earning capacity is excessive. At the time of the accident, based on an hourly rate of $1.60 an hour, and a work week of 40 hours, his annual gross income would have been about $3300. The jury might reasonably have concluded that his earnings as a sawyer or in other active employment would increase over the years. An estimated annual average of $5000 gross income over his working life would have been reasonable. Despite his extreme disability, it would have been unreasonable to suppose that he would be totally unable to earn money during his life. An average annual impairment in the sum of $3500 would have been reasonable. His life ex-

pectancy was 37 years. It would have been reasonable to assume that at least 30 of these would have been productive. The present value of $3500 per year for 30 years, at a rate of five per cent per annum, is about $53,800.

I conclude that the jury award of $111,000 for impairment of earning capacity was not due to perversity or prejudice, and was not the result of error occurring during the course of the trial. I conclude that it was excessive, probably because the jury encountered difficulty with the factor of economic inflation and with the concept of reducing to present value an award for future loss of earnings.

I conclude that $53,800 is a sum which will reasonably compensate plaintiff John McPhee for impairment of his earning capacity.

Order

It is ordered that the defendant's motion for a directed verdict, made at the close of plaintiffs' case, is hereby denied; that the defendant's motion for a directed verdict, made at the close of all the evidence, is hereby denied; and that the defendant's motion for judgment notwithstanding the verdict is hereby denied.

It is further ordered that the verdict with respect to the award for impairment of earning capacity of plaintiff John McPhee is hereby set aside, and that the judgment herein in his favor is hereby amended by being reduced by the sum of $88,800 (which is 80% of $111,000) and that the defendant's motion for a new trial is hereby granted with respect to the issue of damages for impairment of earning capacity, and that the defendant's motion for a new trial as to all other issues is hereby denied; provided, however, that the plaintiff John McPhee may elect, in lieu thereof, to have an amended judgment entered herein in his favor, reduced from the present judgment by $45,760 (which is 80% of the difference between $111,000 and $53,800) if the

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plaintiff, John McPhee, by his attorney, notifies the court within 20 days hereafter by letter, with a copy to opposing counsel, that elects to accept the entry of an amended judgment, reduced by said sum of $45,760, and to remit to defendant any sum which he may already have received in excess of the total amount awarded to plaintiff John McPhee by said amended judgment. Should plaintiff John McPhee elect to appeal from this order, the time within which he may notify the court of such election will be automatically extended until 20 days following the date of notification to counsel for the plaintiff that the mandate of the appellate court has been received by the clerk of this court.

Entered this 2nd day of March, 1970.

By the Court:

/s/ JAMES E. DOYLE
District Judge

APPENDIX G

(Note: Opinion not published; noted in 487 F.2nd 1404, lower court affirmed.)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Oral Argument May 30, 1973

November 9, 1973

Before
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. John W. Reynolds, District Judge*

James A. Sievers,
Plaintiff-Appellee,
No. 72-1628 vs.
Keebler Company, a Foreign Corporation,
Defendant-Appellant,
vs.
McCleary Industries, Inc.,
Third-Party Defendant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 69-C-155
James E. Doyle, Judge

ORDER

It Is Ordered and Adjudged by this court that the judgment of the United States District Court for the Western District of Wisconsin entered in this cause be affirmed on the opinion and order of the said district court. *Sievers v. Keebler*, Case No. 69-C-155 (W.D. Wis., Nov. 30, 1971).

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* Chief District Judge John W. Reynolds of the Eastern District of Wisconsin is sitting by designation.

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The district court determination that Wisconsin's comparative negligence law is "better" law than Illinois' contributory negligence is consistent with prior decisions of this court and the Illinois and Wisconsin Supreme Courts. Judge Campbell discussed the issue in *Elston v. Morgan*, 440 F.2d 47, 50 (1971), stating:

> "* * * It is, of course, regrettable that the State of Illinois here bars one of its citizens so seriously injured from any recovery whatsoever simply because of its continued adherence to this cruel and antiquated doctrine, inherited long ago from the courts of England and long since discarded by that country. The harsh Illinois doctrine of contributory negligence barring any recovery was recently again before the Supreme Court of Illinois in Maki v. Frelk, 40 Ill.2d 193, 239 N.E.2d 445 (1968). In that case the majority opinion recognized that the doctrine should be discarded in favor of a more modern comparative negligence doctrine, but felt compelled to defer to the legislature to make the change. The excellent dissenting opinion written by Mr. Justice Ward, with Mr. Justice Schaefer concurring, took the position that the contributory negligence doctrine was judicially created in Illinois and that therefore the court had the responsibility to make the change. In his dissent, the learned Justice stated:
>
> " 'I am unpersuaded by the argument that there are practical considerations which dictate a retention of the contributory negligence rule. We are told that the adoption of comparative negligence would increase litigation and court congestion, encourage negligent driving and cause insurance rates to be raised. The reply to such "practical" argument is that the dominating questions before our court are whether the old rule contended for is one often of harshness and unfairness and whether the rule proposed for adoption would better serve to attain more just dispositions in negligence cases. The so-called practical

considerations advanced must properly be considered as subordinate to the primary concern for more just judicial dispositions of these cases. Secondly, and persuasively, the evidence assembled of life under a comparative negligence form fails to confirm the fears expressed by the defendant and the *amicus*. See Maloney, From Contributory to Comparative Negligence: A Needed Law Reform, 11 U.Fla.L. Rev. 135, 162 (1958); Bress, Comparative Negligence, 43 A.B.A.J. 127, 130 (1957); Peck, Comparative Negligence and Automobile Liability Insurance, 58 Mich.L.Rev. 689, 726 (1960); and Rosenberg, Comparative Negligence in Arkansas Before and After Surgery, 13 Ark.L.Rev. 89, 108 (1959).' 40 Ill.2d at 203-204, 239 N.E.2d at 451.

"Indeed in our own Circuit, Wisconsin, with its enlightened comparative negligence doctrine has completely confirmed the conclusion of Mr. Justice Ward in rejecting the so-called 'practical' arguments against the adoption of a comparative negligence standard by Illinois. Although it is to be hoped that the Illinois Legislature or the Illinois Supreme Court may soon heed Justice Ward's admonition and consider anew whether the best interests of its citizens are served by permitting such unfortunate results as are presented here, it is beyond our power to do anything but follow the existing law of Illinois as was done by the trial judge."

The appellants argue that the recent Wisconsin Supreme Court decision in *Hunker v. Royal Indemnity Co.*, 57 Wis.2d 588, 204 N.W.2d 897 (1973), requires a different result from that reached by the district court. We disagree. Neither of the concerned parties in *Hunker* were residents of Wisconsin. The court pointed out that no Wisconsin citizen suffered by the application of Ohio law. Id. at 610, 204 N.W.2d at 908. Sievers, the plaintiff in this action, was a Wisconsin resident. In addition, the Wisconsin Supreme Court held that the legal trend is towards laws, such as Ohio's, which bar suits against coemployees.

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Id. at 607, 204 N.W.2d at 907. Illinois' contributory negligence law, which appellant seeks to have applied in this case, is, however, anachronistic, and the legal trend is toward comparative negligence. In short, the Wisconsin Supreme Court held in *Hunker* that a recently enacted Ohio law should be applied in that suit between Ohio residents. It does not follow that Wisconsin would apply an anachronistic foreign law which bars recovery to a Wisconsin citizen. We feel that the district court opinion, which we have adopted, is consistent with Wisconsin law and that the *Hunker* decision does not change that result.

APPENDIX H

In the United States District Court
For the Western District of Wisconsin

James A. Sievers,
Plaintiff,
v.

Keebler Company, a Foreign Corporation,
Defendant and
Third-Party Plaintiff,
v.

McCleary Industries, Inc.,
Third-Party Defendant.

69-C-155.

OPINION AND ORDER

This is a civil action for damages for personal injuries allegedly arising out of an industrial accident in which plaintiff caught his arm in a machine designed and manufactured by the defendant in the State of Illinois and located at the plant of the third-party defendant in the State of Illinois. At the time of the accident and at the time of the commencement of this action, plaintiff was a citizen of the State of Wisconsin. Defendant is a Delaware corporation with its principal place of business in Illinois. The third-party defendant is an Illinois corporation with its principal place of business in Illinois. Jurisdiction is asserted under 28 U.S.C. § 1332.

A pre-trial conference was held, at which time the question was considered whether the substantive law of Illinois or that of Wisconsin should be applied to the tort aspects of the case.

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Briefs have been filed on the above question, with which this opinion now deals.

In determining whether to apply the substantive law of Illinois or that of Wisconsin, I must follow the choice-of-law rule that a Wisconsin Court would follow. *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Korth v. Mueller*, 310 F. Supp. 878 (W.D. Wis. 1970); *Satchwill v. Vollrath Co.*, 293 F. Supp. 533 (E.D. Wis. 1968); *Castonzo v. General Casualty Co. of Wisconsin*, 251 F. Supp. 948 (W.D. Wis. 1966).

Under Wisconsin law, the determination of which substantive law applies requires a two-step analysis. *See Wilcox v. Wilcox*, 26 Wis. 2d 617 (1965). The first step—a determination of whether a true conflict of law exists—requires an analysis of the number of contacts with each of the competing jurisdictions and of the qualitative significance of those contacts. The second step—choosing which law is to apply—requires an analysis of the contacts of each jurisdiction in light of the "choice-influencing considerations" set forth in *Heath v. Zellmer*, 35 Wis. 2d 578, 596 (1967). The second step begins with a "weak presumption" in favor of the law of the forum. *Heath, supra*, at 597; *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98 (1968); *Conklin v. Horner*, 38 Wis. 2d 468 (1968).

The contacts of the competing jurisdictions are not evenly distributed: Wisconsin is the forum state and the residence of plaintiff; Illinois is the place of business of defendant and of the third party defendant, place of accident and place of employment of plaintiff. Although the location of the forum and residence of one of the parties are not facts which call for the application of the substantive law of one jurisdiction over that of the other, their presence in the instant case indicates that Wisconsin has a "significant interest" in the outcome of the

controversy. Inasmuch as Wisconsin and Illinois have disparate laws regarding the effect of a finding of negligence on the part of plaintiff,[1] and inasmuch as both jurisdictions have a significant interest in the outcome of the dispute, I find that a true conflict exists in the present action.

Since a true conflict exists, it is not appropriate to decide which state's negligence law shall apply simply by counting the number of contacts of each jurisdiction. Rather, resort must be had to the "choice-influencing factors" set forth in *Heath v. Zellmer, supra,* at 596:

(1) predictability of results;

(2) maintenance of interstate and international order;

(3) simplification of the judicial task;

(4) advancement of the forum's governmental interests; and

(5) application of the better rule of law.

The Wisconsin Supreme Court has held consistently that the first factor has little relevance in tort actions. *Heath, supra* at 596. Although the Wisconsin Supreme Court has also generally found the second factor to be of little significance, defendant suggests that the imposition of Wisconsin law in the present action might lead to a refusal of Illinois employers to employ Wisconsin residents because of the greater likelihood of employee recovery under Wisconsin law.

The third factor prompts no clear response. This court's greater familiarity with Wisconsin comparative negligence law

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[1] In Illinois, a finding of contributory negligence may bar any recovery by the plaintiff. *Maki v. Frelik,* 40 Ill. 2d 193, 239 N.E. 2d 495 (1968); *Prill v. City of Chicago,* 317 Ill. App. 202, 46 N.E. 2d 119 (1942). Wisconsin, on the other hand, has a comparative negligence statute under which the plaintiff's own negligence will bar his recovery only if it is as great as, or greater than, the negligence of the defendant. Section 895.045 Wis. Stats. (1969). (Statute in force at the commencement of this action).

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is balanced by the arguably easier applicability of a rule of law in which a plaintiff's negligence acts as a bar to recovery. See *Heath, supra*, at 600.

In considering the importance of the advancement of the forum's governmental interest, I must give this factor as much weight as would a state court. The Wisconsin Supreme Court states in *Heath, supra*, at pages 600-01:

> "It is the duty of our court to further Wisconsin's governmental interest as exemplified in the policies behind its law. The policy of our tort law is to provide compensation for persons who are injured by negligent conduct . . . To deny recovery for ordinary negligence is to defeat Wisconsin policy of compensating victims of ordinary negligence. It is the policy of Wisconsin to provide compensation to those persons whether they be residents of this state or whether they come from another jurisdiction."

Wisconsin's deeply entrenched commitment to the policy of comparative negligence is reflected in over 40 years of legislative history.[2] Furthermore, recent pronouncements of the Wisconsin Supreme Court underscore Wisconsin's commitment. See *Heath, supra; Zelinger, supra; Conklin, supra.* I conclude that the application of Illinois law which bars recovery for contributory negligence would frustrate a longstanding and deeply rooted governmental interest of the State of Wisconsin.

The fifth factor—application of the better rule of law—presents different but somewhat overlapping considerations from those taken into account when advancing the forum's governmental interest. Contributory negligence has been described as

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[2] Further evidence of Wisconsin's commitment to the comparative negligence principle is the enactment of an amended comparative negligence statute which liberalizes recovery for ordinary negligence by eliminating the automatic 50 per cent bar rule. *See* Session Laws, ch. 47, 1971.

a "discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953). Comparative negligence law, however, implements a social policy of spreading the risk of loss due to ordinary negligence and of compensating its victims. While the doctrine of contributory negligence has its adherents, I find that Wisconsin law of comparative negligence is the "better rule of law." *See e.g., Decker v. Fox River Tractor Co.*, 324 F. Supp. 1089 (E.D. Wis. 1971); *Frummer v. Hilton Hotels International, Inc.*, 314 N.Y.S. 2d 335 (1969); *Clough v. Liberty Mutual Insurance Co.*, 282 F. Supp. 553 (E.D. Wis. 1968).

Accordingly, upon the basis of the entire record herein, It Is Hereby Ordered that Wisconsin substantive law shall apply to the tort aspects of the present action.

Entered this 30th day of November, 1971.

By the Court:

/s/ JAMES E. DOYLE
District Judge

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APPENDIX I

In the United States District Court
For the Western District of Wisconsin

James A. Sievers,
Plaintiff,
v.
Keebler Company, a foreign corporation,
Defendant and Third-Party Plaintiff,
v.
McCleary Industries, Inc.,
Third-Party Defendant.

69-C-155

ORDER

Defendant Keebler has moved, timely, for judgment notwithstanding the verdict. The principal basis for the motion is that Illinois law of contributory negligence, rather than Wisconsin law of comparative negligence, should have been applied. This question was considered and decided prior to trial and I adhere to that decision.

In the alternative, defendant Keebler has moved for a new trial. I find and conclude that the verdict was based upon substantial evidence. My reasons for denying defendant leave to introduce portions of the deposition of John Richmond are embodied in the record, and I adhere to them. The same is true of my reasons for choosing the form of the special verdict, and my reasons for applying the Wisconsin rule of comparative negligence rather than the Illinois rule of contributory negligence.

Defendant objects to the instructions relating to the duty of a workman, the duty of a manufacturer to warn, and the duty of an installer or servicer of a product; the contention, among others, is that these instructions reflected Wisconsin law, rather than Illinois law; but there is no showing by defendant that Illinois law differs on any of these points, nor was such a contention made during the trial, so far as I can now recall. With respect to the instructions on each of these points, I conclude that there was substantial credible evidence which made each of them appropriate.

For the reasons stated herein and elsewhere in the record, It Is Hereby Ordered that the motion for judgment notwithstanding the verdict is denied and the motion for a new trial is denied.

Entered this 30th day of March, 1972.

By the Court:

/s/ JAMES E. DOYLE
District Judge

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